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Address Official Communications To
American Embassy,
Tokyo,

MEMORANDUM OF CONVERSATION

Subject: Informal Discussions on the United States Standard Draft Treaty of Friendship, Commerce and Navigation

Participants: For the Ministry of Foreign Affairs:

Mr. Morio YUKAWA, Director, Economic Affairs Bureau
Mr. Kenichi OTABE, Vice Director, Economic Affairs Bureau
Mr. Haruki MORI, Chief, First Section, Economic Affairs Bureau
Mr. Takeshi KANEMATSU, Secretary, First Section, Economic Affairs Bureau
Mr. Masao OSATO, Chief, Fourth Section, Treaties Bureau
Mr. Kay MIYAGAWA, Secretary, First Section, Economic Affairs Bureau

For the American Embassy, Tokyo, Japan:

Mr. Jules BASSIN, Legal Attache
Mr. Dudley G. SINGER, Commercial Attache
Mr. Robert W. ADAMS, Second Secretary

Place: Office of the Ministry of Foreign Affairs, Tokyo, Japan.

Date: Thursday, May 8, 1952. TWENTIETH INFORMAL MEETING

ARTICLE VII
(Additional Discussion)

Mr. Yukawa asked for an explanation as to why the term "aliens" is employed in the first and second sentences of paragraph 2. Mr. Kanematsu added that it would appear that a bilateral treaty should limit its references to the "nationals and companies of the other Party" in this connection, and should not employ the general term "aliens".

Mr. Singer replied that it was difficult, if not impossible, to frame a general and wide-sweeping reservation of the type specified in paragraph 2 except by using the term "aliens". He added that since

such reservations were not limited in application to the "nationals and companies of the other Party", but were rather general reservations with respect to all foreign nationals, the use of such a phrase was inappropriate and would, moreover, advance an erroneous implication of discriminatory treatment.

Mr. Otabe stated that this explanation concerning the use of the word "aliens" was satisfactory, adding that this was a theoretical point in as much as the Japanese side had already proposed a revised Article VII.

Mr. Yukawa then referred to that portion of paragraph 2 concerning "new limitations" and the fact that they "shall not be applied as against enterprises which are engaged in such activities therein at the time such new limitations are adopted...". With reference to the relation between this clause and the provisions of Article VI, Mr. Yukawa asked whether the taking of property for public purpose with just compensation under paragraph 3, Article VI would be in violation of paragraph 2, Article VII.

Mr. Bassin replied that the taking of property under paragraph 3, Article VI would not run counter to the provisions of Article VII. In answer to a further question from the Japanese side, Mr. Bassin added that it was impossible to say, except after study on a case-by-case basis, whether "nationalization" of a particular field of activity would be in violation of this particular clause on "new limitations". Generally, he said, a "limitation" was not imposed pursuant to a "nationalization" program; if an over-all nationalization plan were to be implemented by a Government, applicable to all alien ownership in a particular field of activity, it would probably not be considered in violation of paragraph 2, Article VII. The exact dividing line between a "new limitation" and a general "nationalization" program of a Government was difficult to establish in theory, and a case-by-case analysis would be required to determine whether "nationalization" was justified and whether it would over-ride the protection extended in paragraph 2.

Mr. Otabe then referred to the first sentence, paragraph 2, Article VII (which reserves the right to limit the extent...) and to the second sentence of paragraph 4 of Article IX (which permits either Party to impose restrictions on alien ownership...). Mr. Otabe asked whether this right to "limit" and to "impose restrictions" includes the right to prohibit such alien ownership.

Mr. Bassin replied that the right to prohibit such ownership was included in the right to limit or restrict. He added that since the limitation mentioned in Article VII is unqualified, the end-point is unsettled, and that it would therefore embrace the right to prohibit. Mr. Bassin further stated that the intent of the Treaty was to encourage commercial intercourse between the two countries and that it was desirable that such terms as "restrict" or "limit" be used rather than the harsher "prohibition", which might discourage the average businessman interested in the Treaty.

Mr. Yukawa then asked whether a Japanese marine transportation or shipping company engaged in essentially international operations (as mentioned in paragraph 2, Article VII) could lease lands, buildings and other real property in the United States in accordance with paragraph 1 (a), Article IX.

Mr. Singer replied that a Japanese shipping firm could lease such properties in the United States under the terms of paragraph 1 (a), Article IX.

ARTICLES XI and XIX
(Additional Discussion)

Mr. Otabe then asked whether it was intended that national treatment be accorded under paragraph 3, Article XI (concerning the payment of taxes, fees or charges in general) and under paragraph 3, Article XIX (concerning vessels) with respect to tonnage taxes, port taxes, lighthouse charges, quarantine charges, and pilot fees.

Mr. Adams replied that a single schedule of such port and other charges is published in the United States, and is applicable to American and foreign vessels alike. National treatment was therefore contemplated with respect to such charges. In answer to a question by Mr. Adams, Mr. Mori stated that a single schedule of such charges was similarly maintained in Japan, and that the national treatment standard with respect to these taxes and charges was considered appropriate by the Japanese side.

Mr. Otabe then inquired whether either Party could give assistance in the development of its national shipping (as provided for in Article 1 b of the Convention of the Intergovernmental Maritime Consultative Organization, which is mentioned in paragraph 11 of the Protocol of the United States FCN Treaty with Colombia). He further inquired whether such assistance was precluded under the terms of paragraph 4, Article XIX of the standard draft.

Mr. Adams replied that the provisions of Article XIX did not preclude action by either Government to assist in the development of its national shipping in accordance with the Convention mentioned by Mr. Otabe.

ARTICLE VII
(Additional Discussion)

Mr. Otabe then stated that the Japanese side understood that some states in the United States limit the exercise of certain professions to the citizens of the United States or to those who have declared their intention to become citizens. He asked for further clarification from the American side as to whether the present FCN Treaty would over-rule such state limitations, and also inquired whether the alternative to

citizenship (i.e., the declaration of intent to become citizens) might be raised as a further bar to the exercise of certain professions by Japanese nationals.

Mr. Adams replied that, as previously stated by the American side, the provisions of paragraph 2, Article VIII (i.e., "shall not be barred...merely by reason of their alienage") was clear on this point. He further pointed to previous comments to the effect that such an FCN Treaty would become the supreme law of the land in the eyes of the United States. Thus, he added, conflicting state laws or regulations would be over-ruled by the Treaty. Mr. Adams further stated that the declaration of intent to become a citizen could not be used to bar foreign nationals from practicing certain professions, since paragraph 2, Article VIII would remove alienage bars without qualification.

Mr. Kanematsu then stated that it had previously been pointed out by the American side on a number of occasions that the provisions of the present FCN Treaty would, when ratified, become the supreme law of the land in the United States and that in consequence thereof any existing laws or regulations running counter to the Treaty provisions would ipso facto be over-ruled. With reference to this point, Mr. Kanematsu asked whether such contrary laws and regulations would be regarded as null and void without further confirmation by a court or some other authority, if it was necessary to amend existing laws, or if court proceedings were necessary to secure or ascertain the rights guaranteed by the Treaty. He also asked when the validity of the Treaty provisions would be finally determined.

Mr. Bassin replied that the enforcement of Treaty provisions was a problem to be met in several ways; often an official of a particular state could make administrative rulings on its own laws and regulations in consonance with the Treaty provisions; in other cases it might be necessary for a state court to rule on a particular question. Mr. Bassin added that state laws might in some cases have to be amended, or in others might be voided by a competent court. The mechanics of enforcing Treaty provisions would probably vary from case to case, as well as from state to state. Mr. Bassin pointed out that the Treaty assured the right of access to the courts for the purpose, among others, of ensuring the implementation of Treaty rights. He added that the same questions raised by Mr. Kanematsu also existed on the American side with respect to the enforcement of the Treaty in Japan, and that it was understood that a number of procedures, none of which could be specified without assessing the facts in each individual problem, would be employed in Japan, as in the United States, to ensure the effectiveness of the Treaty.

Mr. Kanematsu then stated that it was obvious that Treaty provisions are subject to interpretation on both sides, and that the Supreme Court of the United States once rendered a decision to the effect that treaty provisions might remain merely on the level of international law binding on the two signatory countries, but having no validity as the supreme law

of the land in the United States. In view of this previous interpretation, handed down many years ago, Mr. Kanematsu asked for clarification as to the recent tendencies of Supreme Court decisions in this connection, especially concerning treaty provisions related to such questions as the right to exercise certain professions and the acquisition of real properties by aliens.

Mr. Bassin replied that the Supreme Court of the United States has for a number of years taken a most liberal attitude in this connection, particularly with respect to the disability of alienage in the acquisition of certain rights. He pointed out that in recent times few cases involving this subject have been referred to the Supreme Court in view of the fact that lower courts have taken action with respect to the constitutionality of certain state laws and regulations containing discriminatory provisions. He pointed to a recent decision of the Supreme Court of California, which found a state law barring alien ownership of real properties unconstitutional, as an example of the liberal attitude of lower courts and of the Supreme Court in these matters.

ARTICLE XIII
(Additional Discussion)

Mr. Yukawa requested a definition of the term "commercial traveller" as used in Article XIII, and asked how a commercial traveller differs in status for a treaty merchant.

Mr. Adams replied that a commercial traveller was normally one who was admitted into a country on a temporary visa for a limited period of time. Under the United States Immigration Act of May 26, 1924, a commercial traveller would be admitted entry as a non-immigrant under Section 3 (2) of the Act for a temporary visit. Visas under Section 3 (2) were granted both for business and pleasure trips. A "treaty trader", to whom the privilege of indefinite sojourn in the United States would be granted for so long as the individual were engaged in trade and related activities between the United States and his country pursuant to a Treaty of Friendship, Commerce and Navigation, would be permitted entry into the United States under Section 3 (6) of the Immigration Act. Thus, while both the commercial traveller and the treaty trader were non-immigrants under United States' law, the former was admitted only for a short period of time, while the latter could remain in the United States indefinitely as long as his activities were in accordance with the covering FCN Treaty.

ARTICLE XII
(Additional Discussion)

Mr. Otabe then stated that it was understood that either Party could set different standards for the withdrawal of earnings for different fields of activity, provided there was no discrimination in the application of these standards. He added that it was also understood that different standards of control over various currencies could be

established on the basis of a country's balance of payments position with respect to a particular currency. Mr. Otabe asked if either Party could, therefore, set different standards for the withdrawal of earnings in different currencies, that is, one standard for the withdrawal of earnings from a sterling investment in a particular field of activity, and another standard for the withdrawal of earnings from a dollar investment in the same field of activity.

Mr. Adams replied that, while it had been previously stated that different degrees of exchange control might be established for different currencies on balance of payments grounds, it had been stated that this should not be done in a manner unduly discriminatory. It was believed that the establishment of different standards of withdrawal for different investments within a single field of activity would definitely be discriminatory. Since it would appear that a more favorable withdrawal or conversion rate would be extended to the pound sterling investor under such a system, the American investor or enterprise would operate at a distinct disadvantage. Mr. Adams cited as an example two shipping concerns operating to and from Japan - one, the British, might be permitted to convert into pounds sterling and remit almost all of its earnings in Japan; the second firm, an American enterprise operating in dollars, would presumably be limited to a much lower percentage of convertibility and remittance. Such a situation, he added, would be frankly and unjustifiably discriminatory and would operate to discourage American dollar investment in Japan.

Mr. Otabe asked for a definition of the word "welfare" as used in paragraph 3, Article XII.

Mr. Singer replied that this word was of broad meaning, and was used in Article XII with reference to a country's general well-being, including the necessities and minimum comforts for the maintenance of an adequate standard of living.

It was then agreed that the next informal meeting would be held on May 12, 1952.

/s/ M. Yukawa

Morio Yukawa
Director
Economic Affairs Bureau
Ministry of Foreign Affairs

/s/ Frank A. Waring

Frank A. Waring
Counselor for Economic Affairs
American Embassy
Tokyo, Japan.

FINAL DISCUSSIONS AND NEGOTIATIONS

October 15, 1952 - March 11, 1953